Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Appropriate Framework for Broadband Access to the Internet over Wireline Facilities	)	CC Docket No. 02-33
	)	
Universal Service Obligations of Broadband Providers	)	
	)	
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services: 1998 Biennial Regulatory Review — Review of Computer III and ONA Safeguards and Requirements	)	CC Dockets Nos. 95-20, 98-10

REPLY COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

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July 1, 2002

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Qwest Communications International Inc. ("Qwest") hereby submits its reply comments in these proceedings.

INTRODUCTION AND SUMMARY

Three major objectives should guide this proceeding. *First*, because the last thing that this industry needs now is another regulatory false start, the Commission should adopt rules that will survive judicial review the first time around. To that end, it should both (1) adhere to the plain language of the relevant statutory definitions ("telecommunications," "telecommunications service," and "information service") and (2) treat like services (DSL and cable modem) alike. Otherwise, the legacy of this proceeding would be judicial invalidation and years of destabilizing uncertainty. *Second*, the Commission should not regulate ILECs on the false premise that they somehow dominate the market for broadband services. As the D.C. Circuit recently observed,

the market reality is quite to the contrary.[1/] *Third*, the Commission might wish to avoid taking actions that would abruptly foreclose all "intramodal" competition over legacy ILEC facilities such as the copper loop.

As discussed below, these objectives are entirely compatible, and the Commission can accomplish each of them here. That point would be obvious were it not for the persistent efforts of most other parties in this proceeding to deny it. For example, the major CLECs claim that the Commission cannot interpret "information service" and "telecommunications service" according to their plain statutory meanings, treat DSL and cable modem services like the market substitutes that they are, and, at the same time, preserve a significant role for CLECs and independent ISPs in the competitive landscape. The cable monopolies are only too happy to agree with the CLECs on this point, and the rhetorical posturing reaches its apogee in the comments of AT&T, which is both a CLEC *and* the largest cable company in the United States. For their part, certain other ILECs do little to dispel the myth that, by correctly resolving these statutory characterization issues, the Commission would *ipso facto* wipe out CLEC access to all ILEC facilities.

These supposed trade-offs are illusory. The Commission can follow its statutory mandate, treat like services alike, protect investment incentives, *and* allow CLECs and independent ISPs to retain a competitive role in broadband to the extent that consumers value their services. Specifically, calling an "information service" by its name, and avoiding inconsistency with the *Cable Modem Order* on the definition of "private carriage," would not themselves deprive CLECs of access to an ILEC's network elements under section 251(c)(3). And, for precisely that reason, significant *intramodal* competition would persist for the

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1/ *USTA v. FCC*, 290 F.3d 415, 428-29 (2002).

foreseeable future, providing any necessary protection for the interests of unaffiliated ISPs and removing the need for the *Computer II/III* rules in this setting.[2]

First, there is no disputing that a LEC's bundled DSL/ISP offering is an "information service"; the only controversy is whether that information service contains an embedded "telecommunications service" that end users can be said to purchase separately at the same time that they sign up for the information service itself. As even AT&T acknowledges,[3] the statutory language compels the same negative answer the Commission has reiterated for years: the categories of "information service" and "telecommunications service" are "mutually exclusive."[4] By definition, a "telecommunications service" involves "the offering of telecommunications for a fee directly to the public," and "telecommunications" means "the transmission . . . . of information . . . without change in the form or content of the information as sent and received."[5] When a carrier provides an "information service" to the public, it cannot at the same time provide "directly" to that same public, "transmission . . . of information . . . *without* change in the form or content."

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[2] Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C. 2d 384 (1980) ("*Computer II*"); Report and Order, *Amendment of Section 64.702 of the Commiss*

ion's Rules and Regulations (Third Computer Inquiry), 104 F.C.C. 2d 958 (1986) ("*Computer III*").

[3] AT&T Comments at 14.

[4] Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11520 ¶ 39 (1998) ("*Report to Congress*"); *accord* Report and Order, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 9179-81 ¶¶ 788-90 (1997) ("*Universal Service Order*").

[5] 47 U.S.C. §§ 153(43), (46) (emphasis added).

Second, AT&T is also right that "what's good for the goose is good for the gander."[6] It is curious, however, that this phrase appears at all (much less twice) in AT&T's comments, because it encapsulates the lawlessness of AT&T's position on private carriage. The Commission cannot sensibly treat as "private carriage" any broadband "telecommunications" that the market-dominant cable modem operators provide to unaffiliated ISPs without permitting LECs to provide the corresponding DSL transmission services on a private carriage basis if they wish. At least as to these questions of statutory characterization, the Commission not only can, but legally must, treat those like services alike. Treating them differently would guarantee years of competitively harmful uncertainty as reviewing courts search in vain for a coherent rationale underlying the distinction.

Third, achieving regulatory symmetry in this limited setting would not by itself deprive CLECs of otherwise available rights to lease the legacy facilities of ILECs for the provision of competing DSL services. Unlike the *Triennial Review*,[7] this proceeding focuses on regulation of ILEC *services*, not ILEC *facilities* ("bottleneck" or otherwise). Most of the CLECs' rhetoric, such as the rant by joint commenters WorldCom, CompTel, and ALTS (the "CLEC Alliance") about threats to "interconnection" rights,[8] rests on the premise that these two issues are closely related. But they are not.[9] A network element remains a "network element" no matter what use an ILEC might make of it. The relevant issue for purposes of section 251(c)(3) is whether the

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[6] AT&T Comments at iv, 72.

[7] Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 16 FCC Rcd 22781 (2001) ("*Triennial Review*").

[8] *E.g.*, CLEC Alliance Comments at 27-29.

[9] *Accord* Information Technology Association of America Reply Comments at 8 (distinguishing "Commission rules that enable CLECs to lease unbundled *physical elements* of the ILECs' networks" at issue in *USTA v. FCC* from rules obliging ILECs "to allow ISPs to purchase unbundled telecommunications *services*" at issue in this proceeding).

CLEC seeks access to the element "for the provision of a telecommunications service," such as the provision of DSL transmission services on a common carrier basis either to end users or to ISPs.

To be sure, as the D.C. Circuit has now reaffirmed, the "impairment" standard of section 251(d)(2) places substantial *independent* limits on an ILEC's obligations to make UNEs available, including those used for DSL services that are subject to fierce intermodal competition from cable modem providers and others.[10] But that "impairment" inquiry is analytically separate from the statutory characterization questions at issue in this proceeding. The right of CLECs to obtain access to network elements turns not on the proper statutory classification of *ILEC* DSL services (as "common carriage," "private carriage," or "information services"), but on the outcome of the Commission's "impairment" analysis on remand from the D.C. Circuit's decision. Indeed, except as limited by the "impairment" standard, a CLEC could purchase UNEs to provide DSL transmission services to an ISP affiliate for the provision to end users of bundled information services, so long as the CLEC itself makes the same underlying transmission services available to unaffiliated ISPs on the same terms and conditions. That formal nondiscrimination requirement is nothing new: Under section 251(c)(3), a CLEC may obtain access to an ILEC's network elements *only* "for the provision of a telecommunications service," a term that the Commission has properly equated with common carrier transmission services.

Fourth, no matter what the Commission's resolution of the statutory characterization issues, the persistence of *intra*modal competition via section 251 (not to mention the robust *intermodal* competition that has developed for broadband services) provides one reason among several that the *Computer II/III* rules have outlived their usefulness in this setting. Although

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[10] *See USTA v. FCC*, 290 F.3d at 428-30; *see also* Qwest *Triennial Review* Comments at 11-14.

some ISPs claim that their own retail offerings depend on application of the *Computer Inquiry* rules to LEC broadband services, that position flies in the face of market realities: In contrast to the monopoly environment that characterized the provision of narrowband services when *Computer II* was decided, broadband services are offered today by multiple competitors, among which the LECs are secondary players. ISPs have several alternative paths to reach their customers, and — again in contrast to the world that gave birth to *Computer II* — many ISPs, both local and national, have developed strong market presences of their own and command significant customer loyalty. Moreover, in these circumstances, ILEC broadband providers — just like UNE-based CLECs or perhaps even, as the Commission has suggested, cable modem providers — have strong market incentives to deal with multiple ISPs, because doing so serves only to increase the value of a provider's broadband service. Indeed, Qwest no longer even focuses on providing its own ISP service to most residential customers, but instead provides a choice of over 400 independent ISPs; other major ILECs have likewise stated their intention to deal with multiple ISPs, even in the absence of a regulatory requirement to do so.

In any event, the argument that *Computer II* must continue to apply to LEC broadband services because it does not apply to any other broadband providers, such as cable modem providers, has things exactly reversed. It would be the height of arbitrariness to subject a secondary provider to greater regulatory burdens than its more dominant rival on the theory that *somebody* must bear those burdens. Moreover, the CEI and ONA rules of *Computer III* are widely (and properly) recognized as irrelevant to broadband services, and there is no basis for imposing even more stringent requirements in their place. The point of this proceeding is to eliminate unnecessary and asymmetric regulatory burdens, not to exacerbate them.

Finally, in choosing an appropriate contribution regime for the universal service fund, the Commission should follow a policy of competitive neutrality by requiring contributions from *all* facilities-based providers of broadband Internet access, including cable modem providers.

DISCUSSION

I. ILEC DSL-Related Services Cannot Be "Telecommunications Services" Where The Market Substitutes Offered By Cable Modem Providers Are Not Treated As Such.

The law — the applicable statutory definitions, along with the principle that likes should be treated alike — makes the Commission's task here simpler than it might otherwise have been, because it is both clear and dispositive. As Chairman Michael Powell recently indicated, many of the Commission's litigation troubles in recent years have stemmed from its occasional tendency to make policy calls first and ask legal questions later.[11/] There are hugely significant costs to pushing the statutory envelope in this manner. The Commission disserves the public and the industry alike when it adopts policy outcomes in the teeth of persuasive legal objections that not only threaten to reverse those policy outcomes over the long-term, but also guarantee market uncertainty during the intervening years of litigation. To be sure, no matter how the Commission rules in this landmark proceeding, someone will appeal. But the extent to which the Commission's decisions receive judicial deference depends on whether the reviewing court perceives that the Commission's analysis *began* with precedent and the statutory text and only

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11/ *See* "Powell: FCC Must Follow Act To Have Credibility with Court," *Telecommunications Reports*, May 13, 2002 ("FCC Chairman Michael K. Powell says the Commission has begun 'to take much more seriously' whether its rules comply with the Telecommunications Act of 1996. The failure to do this vigorously in recent years has resulted in the agency's running afoul of the U.S. Court of Appeals in Washington, Mr. Powell said. 'I'm a little tired of do-overs at the FCC.' . . . [F]ollowing the letter of the law would help the Commission in its dealings with the appeals court, he said. 'You have to maintain a long-term credible relationship with them, that institution, if you hope to get that deference on those tough [cases] when you really need it[.]'").

then moved to a policy choice or, alternatively, began with a policy compromise followed by the contrivance of a legal rationale.

That sums up the Commission's choice in this proceeding. Occam's Razor — "the simplest of competing theories [is] preferred to the more complex"[12] — is a particularly useful mechanism for distinguishing the legal arguments that would likely survive judicial review from those that would not. Qwest's position on this proceeding's "statutory characterization" issues is straightforward: *First*, as the Commission has already explained, when a LEC offers a bundled DSL/ISP information service, it does not simultaneously provide an embedded "telecommunications service" as well, because by definition a "telecommunications service" cannot involve "any change in the form or content" of a transmission.[13] *Second*, in the broadband world, as in any other setting, like services should be treated alike. Because the Commission has now permitted cable modem providers to sell volume broadband transmission capacity to ISPs at "private carriage," it has no basis (other than calcified regulatory tradition) for prescribing a different rule for DSL providers as they try to play catch-up. These propositions are easy to express, they make sense, and they are consistent with the statute. In contrast, as discussed below, the comments opposing these positions are marked by their elevation of turgid rhetoric over substance.

A. The Commission Cannot Lawfully Find A "Telecommunications Service" Within An ILEC's Bundled DSL Internet Access Service.

The CLEC Alliance devotes 22 pages[14] to challenging the Commission's well-established position that, because the categories of "information service" and "telecommunications service"

12/ Webster's Ninth New Collegiate Dictionary 816 (1986).

13/ 47 U.S.C. §§ 153(43) ("telecommunications"), (46) ("telecommunications service").

14/ Comments of WorldCom, CompTel and ALTS ("CLEC Alliance") at 56-78.

are "mutually exclusive,"[15] a service cannot be both at once. The CLEC Alliance's challenge, however, is all wind-up and no pitch. A "telecommunications service" is "the offering of telecommunications" — in turn defined as transmission "*without* change in the form or content of the information" — "for a fee directly to the public."[16] "The public" does not buy such a service when it buys a bundled information service, because, by definition, an "information service" (provided "via telecommunications") necessarily *does* involve changes in "form or content."[17] The CLEC Alliance never explains how it expects the Commission to square this statutory language with the substantive position the CLEC Alliance urges upon it. Indeed, the Commission cannot.

The CLEC Alliance next turns to regulatory tradition. It chiefly contends that bundled DSL/ISP information services are indistinguishable, for present purposes, from dial-up access to "voicemail," which was traditionally classified as an "enhanced service." This analogy is untenable. Voicemail is a specialized service to which an end user gains access by employing a different service — ordinary dial-tone — that the end user purchases separately for an unlimited range of other uses. The relevant question is whether the availability of voicemail somehow makes ordinary dial-tone service *itself* an "information service." The answer is no, because *that* service effects no "change in the form or content" of any information transmitted. In contrast, when a LEC provides a bundled DSL/ISP service, it is (by hypothesis) providing a single bundled service, for which an overwhelming number of applications (if not all) *do* involve change in "form or content." Of course, so long as the Commission retains the *Computer II/III*

15/ *Report to Congress* at 11520 ¶ 39 (1998); *accord Universal Service Order* at 9179-81 ¶¶ 788-90.

16/ 47 U.S.C. §§ 153(43), (46) (emphasis added).

17/ 47 U.S.C. § 153(20).

regime, any LEC must provide unaffiliated ISPs the transmission component of that information service on an unbundled basis.[18] But even if that requirement survives, it would have no bearing on the proper regulatory classification of the bundled service an ILEC permissibly sells to end users: that service would remain an "information service" without a "telecommunications service" component.

Notably, even AT&T agrees. As it observes, the statutory definitions of these terms "compel the affirmation of the Commission's prior, correct holdings that broadband Internet access services are information services" — even "when the ISP owns the telecommunication facilities" — and that only "*standalone* 'broadband' transmission services" can be telecommunications services.[19] As a cable modem provider planning to defend the *Cable Modem Order*, AT&T prudently chooses to cede that issue rather than try to explain how a bundled DSL information service could include an embedded "telecommunications service" even though cable modem service does not.

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[18] This duty arguably does not extend to the provision of unbundled transmission services to end users (as opposed to ISPs). *See* Memorandum Opinion and Order, *Joint Application by SBC Communications Inc., et al. Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Arkansas and Missouri*, 16 FCC Rcd 20719, 20889-90 (2001) (separate statement of Commissioner Kathleen Q. Abernathy). Whether or not *Computer II* requires ILECs to provide DSL transmission to end users at all, at most it could require them to provide it on the same bulk basis on which they provide it to themselves and unaffiliated ISPs. *See, e.g.*, Report and Order, *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 16 FCC Rcd 7418, 7420-21 ¶ 4 (2001) ("*CPE Unbundling Order*") ("The Commission has interpreted [the *Computer II* enhanced services unbundling] requirement to mean that 'carriers that own common carrier transmission facilities and provide enhanced services must unbundle basic from enhanced services and offer transmission capacity to other enhanced service providers under the same tariffed terms and conditions under which they provide such services to their own enhanced service operations.'").

[19] AT&T Comments 13-14 (emphasis added).

B. The Commission Cannot Lawfully Saddle ILECs With Common Carrier Obligations For A Limited Set Of Bulk Transmission Services That, When Provided By The Market-Dominant Cable Companies, Are Deemed "Private Carriage."

As discussed in Qwest's opening comments, the Commission has long permitted carriers of all kinds, when non-dominant in a particular market, to offer services in that market on a case-by-case "private carriage" basis, free of traditional "common carrier" regulation, particularly to sophisticated business customers.[20] That principle applies to ILECs as much as any other class of carriers, even when the ILEC proposes to offer the services in question over facilities that might be called "bottleneck" facilities when used to provide some *other* service, such as conventional voice telephony. The principal question in such cases remains not the legacy regulatory identity of the carrier itself, but whether the carrier occupies a dominant role in the relevant service market. For example, the Commission has freed ILECs of "common carrier" obligations when they provide — over the same "bottleneck" loops that they use to provide voice telephony — video programming services to end users in competition with the market-dominant cable television providers.[21]

It follows *a fortiori* that ILECs should be free to use those same facilities to provide market-savvy *ISPs* with bulk DSL transmission services on a "private carriage" basis, just as the cable companies are themselves free to do, even though those companies *do* dominate the

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[20] Qwest Comments at 13-18 (*citing* Declaratory Ruling, *NORLIGHT Request for Declaratory Ruling*, 2 FCC Rcd 132, 134 ¶¶ 19-20 (1987)).

[21] Fourth Report and Order in CC Docket No. 94-1 and Second Report and Order in CC Docket No. 96-262, *Price Cap Performance Review for Local Exchange Carriers*, 12 FCC Rcd 16642, 16715 ¶ 182 (1997) ("LECs are now permitted to participate in video markets as cable operators, through provision of common carrier video services, or as operators of non-common carrier 'open video systems.'"), *aff'd in part and rev'd in part*, *U.S. Tel. Ass'n v. FCC*, 188 F.3d 521 (D.C. Cir. 1999).

broadband market.[22] Again, it makes no difference whether those facilities are characterized as "bottleneck" facilities for the provision of conventional voice telephony, just as it has made no difference when an ILEC seeks to use those facilities, free of common carrier regulation, for the provision of video programming services in competition with cable providers. The analysis might be more complicated if the regulatory classification of these ILEC *services* had some strong logical bearing on CLECs' access to the ILECs' *facilities* for the provision of competing DSL telecommunications services. As discussed below, however, there is no such linkage.[23] The CLECs' suggestions to the contrary in the first pages of their comments, which they ultimately disavow in the back pages with no apparent recognition of the inconsistency,[24] are long on rhetoric and short on substance.

Before it issued the *Cable Modem Order*, the Commission might have had greater discretion as to when and how to free ILECs of common carrier obligations for these bulk sales to ISPs. Now that the *Cable Modem Order* has been issued, however, the Commission lacks such discretion, because it has no plausible rationale for subjecting these second-place broadband providers to greater regulatory burdens than their first-place cable company competitors.[25] And,

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[22] *See* Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, 17 FCC Rcd 4798, 4803-04, 4844-45 ¶¶ 9, 85 (2002) ("*Cable Modem Order*").

[23] Under *WorldCom v. FCC*, 246 F.3d 690, 695 (D.C. Cir. 2001), DSL-related facilities are not categorically immune from otherwise applicable unbundling requirements simply on the theory that ILECs are not *acting* as ILECs when they provide DSL. Qwest does not seek to revisit that issue here.

[24] *See, e.g.*, CLEC Alliance Comments at 72-78; AT&T Comments at 32-36.

[25] *USTA v. FCC*, 2002 WL 1040574, at *12. The CLEC Alliance and AT&T continue to downplay the dominance of cable modem service by arguing that it is limited to residential markets. *See, e.g.*, CLEC Alliance Comments at 35-37; AT&T Comments at 50-52. But it is no more appropriate to slice up the American broadband market for present purposes than it was in the line-sharing context addressed in *USTA v. FCC*. *See* Qwest Comments in CC Docket No.

if any doubt lingered on this point in the immediate aftermath of the *Cable Modem Order*, it was put to rest when the D.C. Circuit cited "the robust competition, and the dominance of cable, in the broadband market" as its primary basis for vacating the Commission's line-sharing rules.

Qwest does *not* seek *perfect* parity in the regulation of cable monopolies and ILECs as a general matter.[26] For example, "incumbent local exchange carriers" are subject to the obligations of section 251(c), but most "cable operators" are not, simply because (for now) the former category is defined largely in terms of a company's legacy status as of February 6, 1996.[27] *That* regulatory imbalance may be illogical as a policy matter, but it is not the topic of this proceeding. The regulatory asymmetry that Qwest *does* challenge in this proceeding is of an entirely different character, because the Commission is plainly free to fix it. As the D.C. Circuit recently explained, the Act compels the Commission to use the tools available to it — such as the

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01-337 ("*Broadband Nondominance* Comments") at 9-24. To begin with, most large businesses purchase neither DSL nor cable modem service, but high-capacity data services (such as frame relay and ATM) dominated by the large national IXCs such as AT&T and WorldCom. *Id.* at 13-15. Second, cable operators do market cable modem packages to small and medium-sized businesses throughout the United States. For example, "AT&T Broadband Business Services" is a full-blown "family of products delivered over AT&T's Broadband cable network" with "features designed specifically for businesses." *See* www.bbs.att.com/home.shtml (visited June 17, 2002). Finally, to the extent that cable modem service is currently unavailable to *some* small businesses that can purchase DSL services, that is no basis for deeming ILECs "dominant" in any sector of the broadband market. For example, the Commission found AT&T non-dominant in the provision of domestic interexchange services and international services at a time when AT&T served approximately 60 percent of the market — far greater than the combined broadband market share of the ILECs today. *See Qwest Broadband Nondominance* Comments at 35. Indeed, on the ground that *future* competition was a "strong possibility," the Commission decided to forbear from regulating AT&T as a dominant carrier for international service for four countries in which AT&T faced absolutely no competition at all. *See id.* at 35 n.118. Qwest discusses these issues in greater detail in the *Broadband Nondominance* proceeding.

[26] *Cf.* 47 U.S.C. § 251(h)(2) (identifying circumstances in which carriers not traditionally considered ILECs can be deemed ILECs because of their market position).

[27] *See id.* §§ 251(h)(1), (2).

"impairment" standard of section 251(d)(2) — to achieve as much regulatory rationality as possible given the constraints of the statutory text.[28]

Here, nothing in the Communications Act keeps the Commission from freeing ILECs, like cable operators, to provide bulk broadband transmission to ISPs at "private carriage" if they so choose. Indeed, as noted, ILECs already provide consumers with non-common-carrier services, such as video programming ("open video") services, over their supposed "bottleneck" facilities.[29] Thus, the question is not whether the Commission has legal authority to *permit* ILECs to sell ISPs bulk DSL transmission at "private carriage" — it plainly does — but whether the Commission has any defensible policy basis for failing to do so and, in the process, for favoring cable modem providers over ILECs.

The answer is no. AT&T's contrary view, appropriately relegated to the back pages of its comments, can be summed up in three main propositions. *First*, AT&T contends, in effect, that existing regulatory asymmetries should be grandfathered into the law in perpetuity, not because such asymmetries are desirable as an original matter, but because, in AT&T's view, deregulatory change is risky and bad. That is no rationale at all: when presented with a choice, the Commission must provide coherent justifications not just for adding new regulatory burdens, but also for retaining old ones once market developments have drawn them into question.[30]

In the same vein, some commenters claim that the relevant market for present purposes is not the end user market for bundled information services, but the wholesale ISP market for *unbundled* broadband transmission; these parties claim that, because ILECs currently enjoy a larger share of *that* market than cable modem providers, they should be required to provide such

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[28] *See USTA v. FCC*, 290 F.3d at 428.

[29] *See supra* p. 11-12.

[30] *See, e.g., Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1043 (D.C. Cir. 2002).

transmission on a common carriage basis even though cable modem providers have no such obligation.[31/] This logic is circular and indefensible. The prevalence of ILECs in the broadband transmission market is a product of the very regulatory imbalance that has compelled ILECs, but not their intermodal competitors, to serve that market.[32/] The Commission cannot logically rely on the consequences of an unjustifiable regulatory asymmetry to perpetuate (much less exacerbate) *that very asymmetry*. Indeed, the circularity of this argument is particularly egregious given the structure of the industry: there would be no market for *any* carrier's DSL transmission services if this same underlying regulatory imbalance were used to help make cable modem service the *de facto* platform for most end user consumers of broadband information services.

Second, AT&T contends that ILECs should be subject to onerous regulatory obligations on the theory that only CLECs, and not ILECs, can be trusted to use the ILECs' network to deploy services using a technology (DSL) that makes lucrative "second lines" unnecessary for ordinary consumers. This is absurd on two levels. First, even if there were empirical support for AT&T's claim that ILECs historically "held back" DSL deployment to preserve "second line" revenue, which there is not,[33/] ILECs plainly cannot continue that strategy now that cable modem service has extended its hegemonic grip to most of the consumer broadband market. Thus, the consequence of an ILEC's "holding back" on DSL deployment today would be the ILEC's

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31/ *See, e.g.*, AT&T Comments at 49; CLEC Alliance Comments at 33-38; Time Warner Telecom Comments at 32-35.

32/ At the same time, as the broadband and ISP markets have matured and grown more competitive, even the cable companies have begun to focus on the ISP market, as the Commission itself has noted, albeit not in a manner consistent with the *Computer II/III* requirements. *See Cable Modem Order* at 4812-18 ¶¶ 20-29.

33/ It is particularly untrue with respect to Qwest, which led the market in the roll-out of DSL.

failure to recover either second-line revenue or broadband revenue, while the rival cable company (or a CLEC) gained a new customer. In any event, as discussed below, this dispute about whether an ILEC may offer bulk DSL transmission to ISPs at private carriage has little logical bearing on the ostensible focus of AT&T's concern: a *CLEC's* right to use an ILEC's underlying network for the provision of competing common carrier (DSL) services. The question in that latter context is what the CLEC proposes to do with those facilities, not what the ILEC would otherwise do. It simply is incoherent to argue, as AT&T does, that ILECs should be forced to sell transmission services to ISPs at "common carriage" on the theory that only CLECs can be expected to roll out DSL over ILEC facilities.

Third, AT&T argues that perpetuating severe imbalances in the federal regulatory requirements applicable to DSL and cable modem services is justifiable because cable companies face state and local regulatory obligations — municipal franchise fees and the like — that ILECs supposedly do not face.[34] But this too is nonsense on several levels. To begin with, cable companies incur such obligations to obtain monopoly franchises for the provision of conventional cable television services, for which they have been quite handsomely rewarded in the form of steadily rising cable rates.[35] AT&T offers no empirical basis whatsoever for believing that these local obligations could or do place cable companies at any competitive disadvantage with respect to the provision of *broadband information services*.

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[34] AT&T Initial Comments at 73-74. Even the factual premise of this argument is overstated: ILECs face similar regulatory obligations in many states and localities throughout the United States. *See generally City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1171-72 (9th Cir. 2001), *cert. denied*, 122 S. Ct. 809 (2002).

[35] *See, e.g.*, Report on Cable Industry Prices, *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, MM Docket No. 92-266, FCC 02-107, ¶ 20 (rel. Apr. 4, 2002) (noting that the average monthly rate for cable television service rose 7.5% from July 2000 to July 2001).

In any event, the appropriate response to AT&T's point, even if it were valid, would be to preempt any state and local regulations that unduly impair the provision of cable modem service, not to perpetuate wildly disparate regulatory burdens for all competing broadband providers on the premise that the burdens come out even in the end. Indeed, they do not remotely come out even: ILECs are subject to a host of network-sharing and other obligations that are generally inapplicable to cable providers, and by themselves those obligations more than make up for whatever extra regulatory obligations cable companies might incur under state and local law as the purchase price of their lucrative cable television franchises. The question here is whether, given that *existing* asymmetry, ILECs should be subject to even *additional* regulatory burdens that cable modem providers do not share — *i.e.*, unnecessary common carrier obligations in the business-to-business context. There is no rational way to answer that question in the affirmative.

C. Proper Resolution Of These Statutory Characterization Issues Would Not Itself Alter The Rights Of CLECs To Use ILEC Network Elements For The Provision Of Competing DSL Telecommunications Services.

An implicit theme in the comments of most CLECs and ISPs is the notion that, *because* cable companies are subject to few regulatory obligations, *some* facilities-based broadband provider must be subject to considerably more burdensome obligations, for otherwise non-facilities-based CLECs and some ISPs would find it difficult to join in the broadband race. ILECs (so the argument goes) are the logical parties to carry that burden, because they are facilities-based and, rationally or not, are *already* subject to disproportionate regulatory obligations now. This argument is wrong on the merits and, in any event, is irrelevant to the issues actually presented in this proceeding.

First, as to the legal merits: When two groups of industry actors offer competing services that are close market substitutes, and a third group of industry actors asks for a regulatory boost, the regulators cannot rationally respond by applying burdensome obligations only to the group

that is running a distant second and not also to the largely deregulated group that threatens to dominate the market. Indeed, as discussed below, it is difficult to imagine an outcome more antithetical to the Commission's announced goal of bringing greater rationality to an already quite confused regulatory regime. *See* Part II, *infra*. If there were any questions about the lawfulness of such Alice-in-Wonderland logic, the D.C. Circuit recently answered them when it vacated the line-sharing rules precisely because the Commission had ignored the market-dominant role of cable modem service.[36/]

Second, whether in Wonderland or in the real world, any desire to give new entrants a regulatory boost at the expense of secondary competitors like the ILECs is logically disconnected from the statutory characterization questions presented here. As explained in Qwest's opening comments, the correct answers to those statutory characterization questions would not themselves deprive CLECs of the right to use an ILEC's supposed "bottleneck" facilities to provide competing DSL services to end users or ISPs. AT&T and the CLEC Alliance both appear to acknowledge this point, but only in passing, and only after admonishing, for page after page, that permitting ILECs to provide bulk DSL services to ISPs on a case-by-case "private carriage" basis *would* somehow tear down the edifice of the 1996 Act. AT&T and the CLEC Alliance betray no awareness of this self-contradiction at the core of their comments.

Indeed, the CLEC Alliance devotes 15 pages to the history of "common carriage" (all the way back to "fifteenth-century England" and the eighteenth-century elaborations of one "Lord Hale") and warns the Commission about the dark consequences for competition that could follow from permitting DSL providers, like their more successful cable modem competitors, to provide bulk broadband capacity to ISPs at "private carriage." But the CLEC Alliance never

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[36/] *USTA v. FCC*, 290 F.3d at 428-29.

manages to say anything sensible about those consequences. Instead, it repeatedly suggests that any relaxation of an ILEC's "common carriage" obligations to any class of customers, no matter how large and sophisticated, would somehow enable the ILEC to refuse "interconnection" with CLECs or otherwise evade obligations under section 251 to make their "bottleneck" facilities available to competitors.[37]

Again, this is nonsense. As Qwest explained in its opening comments, permitting an ILEC to offer bulk DSL capacity to ISPs under case-by-case "private carriage" arrangements would not remove the underlying transmission facilities from the definition of "network element" so long as they are "*capable of being used*," by other carriers, in the provision of common-carrier telecommunications services.[38] Nor would it preclude CLECs from obtaining access to those elements "for the provision of a telecommunications service"[39] — *i.e.*, a common carrier transmission service — whether sold to ISPs or directly to end users. Indeed, except as limited by the "impairment" standard of section 251(d)(2), a CLEC could use those facilities to provide such services to its own ISP affiliate, which in turn could provide finished information services to end users, so long as the CLEC's underlying transmission offering is available to other ISPs on the same terms and conditions (as section 251(c)(3) requires even if *Computer II* did not).[40]

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[37] CLEC Alliance Comments at 31-32.

[38] Qwest Comments at 10-11 (citing Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3846 ¶ 330 (1999) ("*UNE Remand Order*") (emphasis added)).

[39] 47 U.S.C. § 251(c)(3).

[40] 47 U.S.C. § 251(c)(3); *see also* Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 17 FCC Rcd 3019, 3040 ¶ 42 ("*Notice*") (stating that *Computer II* nondiscrimination requirement applies to both ILECs and CLECs).

In sum, reform of ILEC unbundling obligations — now given greater urgency by the D.C. Circuit's invalidation of the *UNE Remand Order* — is properly the focus of the *Triennial Review* proceeding, not this one. The CLEC Alliance's conflation of these two quite different sets of issues, much like its insinuation that the Commission has "surrender[ed] to monopoly blackmail" by proposing to construe the Act's definitional provisions by their terms,[41] is an inflammatory sham.

II. Application of the *Computer II/III* to the Market-Based Relationships Between ILEC DSL Providers And ISPs Would Be Unnecessary and Counterproductive.

Even if the Commission properly resolves the statutory classification issues outlined above — concluding both that a bundled DSL/ISP service contains no "telecommunications service" component and that, when LECs sell bulk DSL to ISPs, they may do so on a private carriage basis — the Commission's existing legacy framework could still have the very effect that the Commission condemned in the *Cable Modem Order*: It could operate to "find a telecommunications service inside every information service, extract it, and make it a stand-alone offering to be regulated under Title II of the Act."[42] Specifically, the Commission's *Computer II/III* rules, if applied to ILECs' bundled DSL/ISP services, could require ILECs to offer the underlying DSL as a stand-alone, telecommunications service to ISPs. But imposing the *Computer II/III* rules in this context would undo the regulatory symmetry appropriately achieved by defining ILEC bulk DSL sales as "private carriage." If the Commission's analysis of the broadband market demonstrates, as it should, that ILECs may appropriately provide bulk DSL transmission service to ISPs on a private carriage basis, no plausible rationale would

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[41] CLEC Alliance Comments at 4.

[42] *Cable Modem Order* at 4825 ¶ 43.

support, at the same time, undermining that very conclusion by reimposing common carrier requirements through the back door of this legacy regulatory regime.

The commenters that seek retention of the *Computer II/III* rules in the broadband context argue, in various ways, that the broadband market is not sufficiently competitive to justify freeing it from the heavy hand of extensive regulation. Indeed, some ISPs have argued that the application of the *Computer II/III* rules to LEC broadband services is indispensable to their ability to serve customers.[43] The California Internet Service Providers Association, for instance, warns in its opening comments that "[i]t is hard to imagine a more alarming prospect" to independent ISPs than the elimination of *Computer II/III*.[44]

These concerns are without merit. As Qwest noted in its initial comments, the growing diversity of options available in today's marketplace for wholesale broadband transmission services, combined with the impressive customer loyalty that ISPs have garnered, belies these concerns. The competitive nature of today's broadband and Internet access markets gives ILECs strong inherent incentives to provide broadband transmission to ISPs on mutually acceptable terms, quite apart from the artificial constraints of the regulatory framework. Under these circumstances, the *Computer II* unbundling rule, and the inscrutable Comparably Efficient Interconnection ("CEI") and Open Network Architecture ("ONA") requirements of *Computer III*, are entirely unnecessary. Cementing that conclusion is the fact that no other providers — including cable operators, the undisputed leaders in the provision of broadband services — are subject to such onerous restrictions on their market behavior. And yet, as the Commission observed in the *Cable Modem Order*, even in the absence of regulatory obligations, these other

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[43] *See, e.g.*, California Internet Service Providers Association Comments at 54; EarthLink Comments at 28;

[44] California Internet Service Providers Association Comments at 13.

market players have begun providing at least some ISPs with access as a result of the incentives produced by a robust, competitive broadband market.

As the D.C. Circuit recently explained, it makes little sense to impose regulation designed to give competitors a leg up "where there is no reasonable basis for thinking that competition is suffering from any impairment."[45] The Commission should therefore decline to apply the *Computer II* and *Computer III* rules to ILEC broadband services, and permit LECs to enter into individually negotiated agreements with ISPs on market-based terms.

A. The *Computer II/III* Rules Were Designed to Address Market Conditions That Do Not Exist in Today's Broadband Marketplace.

By just about any conceivable measure, the circumstances that gave rise to the *Computer II* and *Computer III* rules — a narrowband market for "basic services" dominated by wireline carriers in a market characterized by small, start-up ISPs — are absent in the market for broadband transmission at issue in this proceeding. AOL Time Warner acknowledges that the *Computer II/III* regime "consists of multiple rules adopted over an extended period in which broadband was not under consideration."[46] Different marketplace facts with respect to broadband justify different regulatory conclusions than were reached in *Computer II* and *Computer III*.

This is not to say that the *Computer II/III* requirements are themselves "technology specific"[47] — that argument is nothing but a straw man put forth by commenters seeking to prop up these legacy regulations. It is not the technology underlying a service, but the state of competition for that service, that must inform the analysis of whether it makes sense to apply, or

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[45] *USTA v. FCC*, 290 F.3d at 422.

[46] AOL Time Warner Comments at 30.

[47] *See* California Internet Service Providers Association Comments at 43; *see also* CLEC Alliance Comments at 50, 52; Sprint Comments at 13-14.

continue to apply, the *Computer II/III* rules. In the context of the broadband (and ISP) market, an analysis of the competitive conditions reveals that application of the rules no longer makes sense, imposing costs without producing significant benefits. As the Commission observed in the *Notice* in questioning the relevance of the *Computer II/III* rules to broadband services, those rules were developed to address "the service and market characteristics present" at the time.[48/] Those characteristics consisted of a marketplace in which competing and fledgling information service providers were "*dependent* upon the common carrier offering of basic services" — services they could only obtain from LECs — in order to provide their own end-user offerings.[49/] *Computer II* and *Computer III* were prompted by a situation in which "the telephone network [was] the primary, if not exclusive, means through which information service providers [could] gain access to customers,"[50/] and were designed to limit BOCs' ability to abuse the power they possessed in that scenario over competing information service providers trying to gain market share.

Given the current diversity of potential sources for broadband transmission, both intermodal and intramodal, as well as the significant market presence and consumer loyalty now enjoyed by many ISPs, that scenario clearly is *not* present today. As the Commission recently noted, "the one-wire world for customer access appears no longer to be the norm in broadband services markets as the result of the development of intermodal competition among multiple platforms, including DSL, cable modem service, satellite broadband service, and terrestrial and

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48/ *Notice* at 3040 ¶ 44.

49/ *Computer II* at 474-75 ¶ 231 (emphasis added).

50/ *Notice* at 3037 ¶ 36.

mobile wireless services."[51] Indeed, the D.C. Circuit just observed that the Commission's "own findings" confirm "the robust competition . . . . in the broadband market" and "the dominance of cable."[52] The Commission similarly has recognized that many ISPs, far from their "fragile" state at the time the *Computer II/III* rules were developed, now are large, sophisticated businesses with extensive and loyal customer bases.[53]

In the context of the vibrant broadband and ISP markets that have developed, the *Computer II/III* rules have no place. As the Commission observed even four years ago, the development of large, sophisticated ISPs is a phenomenon that "reduces the BOCs' ability to discriminate" in the provision of broadband transmission services.[54] And the Commission has specifically recognized that the *Computer II/III* rules, in particular, should give way in the face of competition, noting with respect to the *Computer II/III* rules in particular that "the movement toward . . . competition should . . . decrease and eventually eliminate the need for regulation of the BOCs."[55] With respect to broadband services, that time has arrived, and that prediction has come true.

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[51] Notice of Proposed Rulemaking, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 16 FCC Rcd 22745, 22747-48 ¶ 5 (2001) ("*Broadband Nondominance Notice*").

[52] *USTA v. FCC*, 290 F.3d at 428.

[53] *See United States v. W. Elec. Co.*, 673 F. Supp. 525, 566 (D.D.C. 1987), *rev'd in part on other grounds*, 900 F.2d 283 (D.C. Cir. 1990) (noting that at the time the *Computer II/III* rules were drafted, "information services [were] fragile" and the "ability for abuse" of competing information service providers by BOCs was accordingly at its apex).

[54] Further Notice of Proposed Rulemaking, *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, 13 FCC Rcd 6040, 6063-64 ¶ 36 (1998) ("*Computer III Further Notice*").

[55] *Computer III Further Notice* at 6072-73 ¶ 51.

B. The *Computer II* Unbundling Requirement Has No Role In A Competitive Marketplace For Broadband Services.

As noted above, when the *Computer II* unbundling requirement was imposed in 1980, local exchange carriers were the only source of the underlying transmission facilities used to provide "enhanced services,"[56/] and it was assumed that those carriers would use their control over those facilities to frustrate efforts by nascent, competing ISPs to enter the marketplace. Today, however, a far different reality obtains: cable modem providers are, far and away, the leaders in the provision of end-user broadband services,[57/] and wireless and satellite providers offer competing broadband service as well, and are growing. Yet, under the *Computer II* unbundling requirement, LECs alone are saddled with the unbundle-and-tariff requirement for no other reason than that it may have made sense years ago to regulate a *different* service that they provided under *different* market conditions.

Given the state of today's broadband marketplace, the argument made by some ISPs in this proceeding — that they need the *Computer II* unbundling rule to remain in business — rings hollow. The "what if" nightmare scenarios outlined by some commenters[58/] concerning the demise of ISP competition that would result from a lifting of the *Computer II* requirements bear no resemblance to the realities of the broadband market: indeed, these commenters all but deny the broadband market's existence. But as the Commission has recognized, ISPs have access to several different types of technology — cable, satellite, fixed wireless, and DSL — that they may

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56/ *Notice* at 3037 ¶ 36.

57/ *Cable Modem Order* at 4803-04, 4844-45 ¶¶ 9, 85.

58/ *See, e.g.*, California Internet Service Providers Association Comments at 13 (arguing that"[i]t is hard to imagine a more alarming prospect" to independent ISPs than the elimination of *Computer II/III*).

use to provide end-user services.[59] Moreover, as explained above, CLECs' ability to serve ISPs, and thus create intramodal competition, is ensured given that CLECs can gain access to broadband-related UNEs used to provide broadband transmission to ISPs, to the extent that the lack of access to such UNEs would in fact impair the CLECs' provision of services.[60]

In the face of such competition, the market itself drives and will drive broadband providers to supply ISPs with access. Indeed, in the *Cable Modem Order*, the Commission noted that some voluntary access relationships had begun developing between ISPs and cable operators even in the absence of a regulatory overlay.[61] If ILECs were likewise freed from the *Computer II* unbundling requirement, they would doubtless engage in voluntary relationships with ISPs as well, for the simple reason that it would be in their interest to do so. As both ISPs and CLECs have observed in this proceeding, today's customers demand access to their ISP of choice, and often are quite loyal to their preferred ISP based on particular features offered by particular ISP services; in the words of one commenter, "[f]ew other products encourage such fierce customer loyalty and support as the service provided by an independent ISP."[62] Indeed, if this were not

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[59] *See* Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc. to AT&T Corp.*, 15 FCC Rcd 9816, 9867-68 ¶ 117 (2000) ("ISPs lacking direct access to provide broadband services over cable systems are entering into alliances with alternative broadband providers, thereby accelerating the deployment of these technologies.").

[60] 47 U.S.C. § 251(d). And, of course, to the extent that those UNEs do not meet the "necessary or impair" test, CLECs, by definition, can provide those facilities themselves.

[61] *Cable Modem Order* at 4812-18 ¶¶ 20-29.

[62] American Internet Service Providers Association at 2; *see also* EarthLink Comments at 24-25 ("Today there are thousands of ISPs, large and small, regional and national, each of which provides consumers a particular combination of benefits . . . . For example, some ISPs focus on small-business consumers, others serve larger businesses, and still others serve rural communities and their particular needs."); CLEC Alliance Comments at 27 (noting that ILEC-based ISPs "typically do not provide business customers . . . [the] services they demand[] such as static IP addressing and routed CPE"); Tanya Kreisky, "Judgment Day," *Internet Magazine*, Sept. 1, 2001, at 38 (noting that 67.2 percent of respondents in magazine survey had stayed with

the case, it would be difficult to see what public interest there would be in advancing such ISP choice. The fact is, however, that customers' demand for ISP choice exists, and in a competitive market, providers will respond to that demand. As the Commission noted in the *CPE Unbundling Order*, "[i]n a competitive market, carriers have an incentive" to offer every potential customer the fullest range of services possible.[63] Indeed, Qwest now focuses on offering its residential end user customers a choice of over 400 ISPs, and it has every reason to expect that it will continue, in the future, to maintain and establish new relationships with ISPs, both large and small.[64] SBC and Verizon, which actively provide their *own* ISP services, have pledged to negotiate with ISPs to establish market-based access agreements as soon as the Commission lifts the *Computer II* unbundling requirement.[65] The Commission simply should not accept the ISPs' groundless jeremiads about the consequences of eliminating the *Computer II* requirement with respect to broadband.

In a similar vein, some ISPs, much like some CLECs, contend that *Computer II must* be kept in place precisely because no broadband providers other than LECs are required to offer their broadband transmission under tariff.[66] As discussed in Part I.C above, however, that

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the same ISP for more than one year and stating that "despite the choice [of ISPs in the market], and the ease of subscribing to call-only ISPs or flitting between unmetered options, people had a certain commitment to their providers").

[63] *CPE Unbundling Order* 7433-34 ¶ 26; *cf.* S. Besen *et al.*, "The Incentives of Cable Operators to Carry Multiple ISPs," Charles River Associates Inc., Dec. 1, 2000, at 2 ("If artificially limiting the availability of unaffiliated ISPs reduces the value of the services offered by a cable operator to some of its potential customers, it increases the likelihood that these customers will choose service from a competing high-speed access provider. Such lost customers represent foregone profits that the cable operator could have earned, since the operator would have shared in the revenue earned by the unaffiliated ISPs to which these customers would otherwise have subscribed.").

[64] *See* Qwest Comments at 30.

[65] *See* SBC Comments at 5-6; Verizon Comments at 31.

[66] *See, e.g.*, Ohio Internet Service Providers Association Comments at 46-47.

observation proves just the opposite point: in a competitive marketplace, it is arbitrary and capricious to subject one provider of a service (and a secondary player at that) to greater regulatory burdens than a similarly situated provider of the same service, on the theory that the burden must be borne by *somebody*.[67] While the Commission was correct not to apply *Computer II* to Internet-over-cable providers in the *Cable Modem Order*,[68] that decision compels the Commission to reach the *same result* — not a contrary one — with respect to LEC DSL providers in this proceeding.

Nor does it make any sense to assume, as some commenters do, that the *Computer II* unbundling requirement should be taken as a given and should act as an absolute bar to ILECs' seeking to act as non-common carriers (which, as explained above, they should be entitled to do) with respect to broadband transmission.[69] That sort of perverse logic — using the existence of one set of unnecessary regulations to justify the preservation of another — is squarely at odds with the Commission's goal of a "minimal regulatory environment" for broadband that "promotes investment and innovation in a competitive market."[70] As explained above, incumbent LECs' clear lack of market power with respect to broadband transmission services means that they should be free, if they so choose, to negotiate individually tailored agreements with ISPs on a private carriage basis; and it follows from *that* conclusion that the *Computer II/III* rules should be eliminated.[71] And while some commenters argue that sections 201(b) and 202(a)

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[67] *Cf. Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 768 (6th Cir. 1995) (invalidating FCC rules regulating PCS wireless services differently from cellular services).

[68] *Cable Modem Order* at 4825 ¶ 43.

[69] *See, e.g.*, CLEC Alliance Comments at 64; California Internet Service Providers Association Comments at 16-17.

[70] *Notice* at 3022 ¶ 5.

[71] *See supra* pp. 10-17.

provide an independent basis for requiring ILECs to unbundle their broadband transmission and sell it under tariff,[72] those provisions, by their own terms, apply only to common carriers.[73] If the Commission finds that ILECs may provide DSL services to ISPs on a non-common carriage basis, it would be circular to conclude here that sections 201 and 202 compel a different result.

C. *Computer III* Is Widely Seen As Irrelevant, And It Should Be Abolished With Respect To Broadband Services.

About the only thing that most commenters seem to agree on is the proposition that, at least with respect to the broadband transmission market, the CEI and ONA requirements of *Computer III* have been useless, and should be eliminated. For instance, ITAA bluntly states that the ONA requirement "has been *irrelevant* to ISPs that seek to provide high-speed Internet access services."[74] The CLEC Alliance also notes that few enhanced service providers take advantage of the *Computer III* protections.[75] Not only, then, is the application of *Computer III* to LECs alone unjustifiable as a matter of regulatory fairness; it also is, by virtually all accounts, totally ineffectual.

This failure of the complicated *Computer III* rules is no accident. Presupposing that the relationship between the DSL provider and the ISP will be an antagonistic one, ONA and CEI dictate numerous ways in which LECs and ISPs must cooperate.[76] But in a marketplace in which LEC DSL providers have competitive incentives to deal with ISPs voluntarily on mutually

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[72] *See* Information Technology Association of America Comments at 12-14 (*citing CPE Unbundling Order* at 7445-46 ¶ 46).

[73] *See* 47 U.S.C. § 201(b) ("All charges, practices, classifications, and regulations for and in connection with [common carrier] communication service, shall be just and reasonable . . . ."); *id.* § 202(a) ("It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges . . . .").

[74] Information Technology Association of America Comments at 32 (emphasis in original).

[75] CLEC Alliance Comments at 53.

[76] *See* Qwest Comments at 22-23 n.54 for a description of the *Computer III* requirements.

beneficial terms, there is no reason to maintain such labyrinthine rules, for it is in both parties' interests to ensure that the LEC-ISP relationship is a mutually beneficial one. Elimination of the *Computer III* requirements with respect to broadband should therefore be a central part of the Commission's plan for uprooting "regulatory underbrush" that prevents broadband from blossoming to its fullest potential.[77]

D. There Is No Basis For Imposing More Stringent Requirements On The Provision of DSL Transmission In Place Of *Computer II/III*

Predictably, some ISP and CLEC commenters suggest that what is needed is more regulation, not less, to bring about the goals that *Computer II and Computer III* were initially designed to accomplish. Some propose implementing a cost-based, UNE-like regime for ISPs,[78] while others invoke the granddaddy of regulatory maximalism, structural separation.[79] But given the Commission's recognition of the wisdom of allowing market-based solutions to drive broadband deployment, these proposals are misguided; indeed, they are utterly out of step with the goals of this proceeding and the Commission's other pending broadband-related proceedings. The point of this proceeding must be to *eliminate* unnecessary and asymmetrical regulatory

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[77] *See* Third Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 17 FCC Rcd 2844, 2960 (2002) (separate statement of Commissioner Kevin J. Martin).

[78] *See* CLEC Alliance Comments at 55; Information Technology Association of America Comments at 34.

[79] *See* AT&T Comments at 60-61. That suggestion is particularly ironic given that the *Computer II/III* framework, which those same commenters embrace, was specifically modified to provide an *alternative* to structural separation requirements; as the Commission has noted, it adopted the preferred, nonstructural guidelines of *Computer III* after "determin[ing] that the costs of structural separation outweighed the benefits." Report and Order, *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, 14 FCC Rcd 4289, 4293-94 ¶ 7 (1999).

burdens, not to *exacerbate* those burdens. Indeed, in light of the Commission's determinations in the *Cable Modem Order*, any other approach would be irrational.

The Commission's goal here (as well as in the *Triennial Review* and *Broadband Nondominance* proceedings) should be to let the market dictate the terms of the relationship between ILEC broadband providers and other market participants wherever possible. Such market-driven relationships will result in enhanced quality and quantity of ISP access. The objective should be not to prop up ISPs that consumers do not value solely to preserve a patina of competition for its own sake, but to enable those ISPs with an end-user product that consumers *do* value to obtain broadband transmission on terms that benefit both the LEC *and* the ISP.

This last point bears particular stress, given the arguments raised by some commenters about the unique market niche that independent ISPs fill for rural, small business, and other classes of broadband customers who might otherwise go unserved.[80] The advantage of a market-based ISP access regime, of course, is that, if consumers value the services that particular ISPs provide, broadband providers of all types inevitably will have an incentive to offer transmission to those ISPs.

Moreover, there should be no need to regulate the specific terms of broadband service arrangements in a competitive market. As the Commission correctly noted in the *Computer III Further Notice*, "BOCs are unable to engage successfully in discrimination and cost misallocation to the extent that competing ISPs have alternate sources of access."[81] As discussed above, ISPs *do* have alternate sources of access today, and the range of available alternatives can only grow over time. If one broadband provider's terms for transmission are unappealing to ISPs, they will be able to migrate to others, and the provider seeking to impose unreasonable

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[80] *See* EarthLink Comments at 26; CLEC Alliance Comments at 27-28.

[81] *Computer III Further Notice* at 6071-72 ¶ 49.

terms will find itself the ultimate loser, as first ISPs and then customers vote with their feet. In such a market, regulation can only serve to impede competition, not help it flourish.

III. Section 254 Requires that All Providers of Broadband Internet Access Contribute to Support Universal Service

In the *Notice*, the Commission also seeks comment on whether facilities-based providers of broadband Internet access, such as DSL and cable modem service, should be required to contribute to support universal service. In reply comments filed in the *Universal Service Contribution Reform* proceeding, Qwest has argued that all facilities-based providers of broadband Internet access services, including cable modem providers, should be required to contribute directly to the fund based on their provision of telecommunications to themselves. Qwest does not repeat its arguments in that proceeding here, but instead responds to the particular views expressed on this issue in the initial comments.

Commenters that address universal service issues in this proceeding generally agree that competitive neutrality must guide the Commission's determination of which entities must contribute to federal universal service.[82/] Even Comcast acknowledges that competitive neutrality is a critical factor in determining contribution requirements.[83/] Not surprisingly, however, Comcast and the National Cable and Telecommunications Association ("NCTA") attempt to obfuscate the fact that the current contribution methodology is *not* competitively neutral in that it requires contributions from LECs that provide DSL services, but not from cable modem providers with which they directly compete. But try as they might, there is no manner in which any commenter can portray that imbalance as competitively neutral either in intent or effect.

82/ *See, e.g.*, Allegiance Comments at 68; National Rural Telecom Association Comments at 23-24; CLEC Alliance Comments at 84.

83/ *See, e.g.*, Comcast at 29-32.

The cable companies accordingly propose delay, rather than resolution. They suggest that no change should be made to the current discriminatory contribution requirements until the Commission completes several other proceedings that relate to universal service, although most of these are only tangentially related to the universal service issues raised in this proceeding.[84/] The cable companies point out that the issue of what contribution requirements should be applied to facilities-based providers of Internet access is closely related to the general issues raised in the *Universal Service Contribution Reform* proceeding.[85/] No doubt this is true; while the Commission presumably will determine, based on the issues raised in this docket, *whether* facilities-based broadband Internet access providers should be required to contribute to universal service, it will determine in the *Universal Service Contribution Reform* docket *the basis* (*e.g.*, revenues or connections) on which all providers should contribute. Thus, Qwest agrees that the universal service issues raised in these two proceedings are related and must be addressed in tandem, but resolution of the issues raised in this proceeding need not be delayed simply because the Commission's other proceeding is pending. Moreover, the outcome of this proceeding does not depend on the resolution of the other proceedings noted by Comcast and NCTA: Regardless of whether and how the Commission modifies the size and distribution of high cost, schools and library, or rural health care support, the fact remains that the current contribution requirements are not competitively neutral as required by section 254 of the Act, and *that* is the issue the Commission must resolve here.

There is also no merit to Comcast's suggestion that deciding this issue — whether the same contribution requirements should be applied to cable modem and DSL providers — would require the Commission to reexamine whether *all* types of entities providing telecommunications

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84/ Comcast Comments at 15-18; NCTA Comments at 3-6.

85/ *See, e.g.*, Comcast Comments at 16-17.

in *any* context should have to contribute to the universal service fund.[86] The Commission has already recognized the need to apply the same contribution requirements to competing providers, *regardless* of whether they provide telecommunications or telecommunications *services*; the key consideration instead is whether the product or service at issue competes directly with a product or service offered by another entity from which the Commission *does* require contributions.[87] For example, in the *Universal Service Order*, the Commission found that principles of competitive neutrality required contributions from both payphone service aggregators and "private carriers" that offer their services to others for a fee, because their "telecommunications carrier" competitors were already required to contribute.[88] The same logic should apply in determining, in this proceeding, whether to require contributions from those facilities-based providers of broadband Internet access that currently are not contributing to universal service, but that compete with providers that *are* required to contribute.[89] Thus, if the Commission decides in this proceeding or the *Universal Service Contribution Reform* proceeding that DSL providers should continue to contribute to universal service, it should also require contributions from all competing providers of broadband Internet access. Conversely, if the Commission determines that the public interest does not require contributions from cable modem providers, it should exempt all competing providers.

No party disputes that the Commission possesses ample authority to require contributions from all facilities-based providers of broadband Internet access, including cable modem

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[86] Comcast Comments at 27.

[87] *Notice* at 3054 ¶ 80; *Universal Service Order* at 9183-84 ¶ 795 (striving to "reduce the possibility that carriers with universal service obligations will compete directly with carriers without such obligations.")

[88] *Universal Service Order* at 9183-84 ¶ 795.

[89] *See* Allegiance Comments at 68-69.

providers. Under section 254, every telecommunications carrier that provides interstate telecommunications services must contribute on an equitable and nondiscriminatory basis to support universal service; in addition, the Commission may require other providers of interstate telecommunications to contribute to universal service "if the public interest so requires."[90] Facilities-based providers of broadband Internet access — or, for that matter, any type of Internet access — provide "telecommunications" to themselves in providing "information services" to their end users.[91] In the *Report to Congress*, the Commission recognized its authority to require contributions from facilities-based ISPs, but declined to impose contributions on these providers because of perceived operational difficulties associated with determining the amount of and enforcing such contributions.[92] With the proposed shift to a connection-based universal service contribution methodology, this concern would disappear. Under a connection-based contribution methodology, facilities-based broadband Internet access providers would contribute based both on the number and size of their end user connections, thus eliminating the need to determine the portion of their revenues subject to contribution.

Finally, assessing universal service contributions on all facilities-based providers of broadband Internet access is fully consistent with the Commission's objective of promoting the deployment of advanced services. Comcast is simply wrong when it asserts that "[u]nder the approach contemplated in the *Notice*, 'facilities-based' providers of Internet access would face a universal contribution requirement, but those who lack facilities would not."[93] While non-facilities-based providers do not contribute directly to universal service, they make indirect

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[90] 47 U.S.C. § 254(d).

[91] 47 U.S.C. § 153(20); *see Cable Modem Order* at 4823 ¶ 39; *Report to Congress*, 13 FCC Rcd at 11534 ¶ 69 & n.138.

[92] *Report to Congress*, 13 FCC Rcd at 11534 ¶ 69.

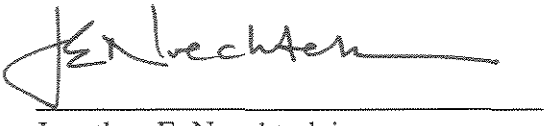
[93] Comcast Comments at 28.

contributions through universal service charges paid to providers of underlying telecommunications services. Requiring contributions from facilities-based Internet access providers would address this disparity.

CONCLUSION

For these reasons and those stated in Qwest's initial Comments, the Commission should take this opportunity to establish a symmetrical, deregulatory framework for broadband services by (a) confirming that ILECs' bundled offerings of broadband transmission and Internet access are information services with no "telecommunications service" component; (b) determining that ILECs may provide broadband transmission to ISPs on a private carriage basis; (c) eliminating the *Computer II/III* requirements with respect to LEC broadband offerings; and (d) ensuring that all providers of broadband Internet access contribute to universal service.

Respectfully submitted,



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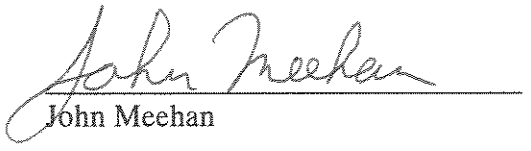

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